

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Chesapeake Bay Foundation, Inc.  
Philip Merrill Environmental Center  
6 Herndon Avenue  
Annapolis, MD 21403,

Plaintiff,

v.

U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314,

Defendant.

No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This is an action brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, to compel the United States Army Corps of Engineers (USACE) to produce improperly withheld agency records pertaining to permit requests and supporting documentation for the development of Little Island and Dobbins Island on the Magothy River in Maryland. The USACE has admitted to withholding 497 pages of agency records responsive to a FOIA request by the Chesapeake Bay Foundation, Inc. (CBF). Exhibit 1, Letter to CBF from USACE (July 3, 2008).

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 (federal question jurisdiction).

3. Venue is properly vested in this Court under 5 U.S.C. § 552(a)(4)(B).

## **PARTIES**

4. Plaintiff CBF was founded in 1967 and is now the largest privately funded, non-profit organization dedicated to protecting and restoring the Chesapeake Bay. The CBF has over 200,000 members and a full-time staff of approximately 160 people who are dedicated to sustaining the Chesapeake Bay's ecosystem by substantially improving the water quality and productivity of the watershed, in addition to maintaining a high quality of life for the people of the Chesapeake Bay region. To achieve these goals, the CBF seeks to reduce pollution, restore habitat, replenish fish stocks, and educate and engage constituents in the Chesapeake Bay region. The CBF's environmental protection and restoration efforts conserve the Bay's natural resources by fighting for strong and effective laws and regulations to protect the Bay and its tributaries from pollution and other harmful activities. A key component of the CBF's environmental protection and restoration efforts is ensuring that laws already in place to protect the environment are enforced.

5. Defendant USACE is an agency of the United States government subject to the FOIA under 5 U.S.C. § 552(a) and (f)(1).

## **FACTS**

6. Dobbins Island (aka Dutchship Island) and Little Island (aka Little Dobbins Island) are islands located in the Magothy River in Anne Arundel County, Maryland. The Magothy River is a tributary to the Chesapeake Bay.

7. The USACE has permitting authority for construction and development work on Little Island and Dobbins Island in the Magothy River.

8. In the 1990s, Little Island and Dobbins Island were purchased by Dutchship, LLC (Dutchship), which on information and belief is a company owned by Jim and Edward Wilson.

In November 2004, David and Diana Clickner (the Clickners) purchased Dobbins Island from Dutchship. In 2000, DCW Dutchship Island, LLC (DCW) purchased Little Island from Dutchship.

**A. Little Island**

9. DCW is a limited liability company organized under the law of the state of Maryland, with its principal place of business at 8421 Veterans Highway, Millersville, Anne Arundel County, Maryland.

10. Daryl Wagner, acting on behalf of DCW, performed significant construction work on Little Island, including demolishing a pre-existing cottage and replacing it with a significantly larger house, a swimming pool, and a lighthouse. Neither DCW nor Mr. Wagner had obtained the proper permits and variances from Anne Arundel County, the State of Maryland, and the USACE prior to performing this work.

11. DCW and Daryl Wagner filed a joint application for a construction permit with the State of Maryland and the USACE in June, 2000 to install a 496-foot stone revetment and to replace an existing pier (Application Number 200065383). Mr. Wagner built a revetment approximately 700-feet long on the property along with a boat ramp, boat lifts, and other structures outside of the scope of the initial permit application. In March, 2005, Mr. Wagner applied for permits to perfect this unauthorized work (Application Numbers 2005562267 and 200562881).

**B. Dobbins Island**

12. Upon information and belief, since purchasing Dobbins Island from Dutchship, the Clickners have sought permits from the USACE to perform construction work on Dobbins Island.

**C. The CBF FOIA Request**

13. On April 19, 2007, the CBF submitted to the USACE a request for records under the FOIA (hereinafter, CBF FOIA Request). Specifically, the CBF FOIA Request sought the production of:

Any and all permit requests, permit approval and denials and all supporting documents pertaining to applications submitted by the following for development and revetment of Dobbins Island and Little Island in the Magothy River:

Mr. Daryl Wagner

Dutchship, LLC

Mr. David Clickner

Mrs. Diana Clickner

Exhibit 2, CBF FOIA Request.<sup>1</sup>

14. One of the relevant records held by the USACE that CBF sought is a photographic summary of the construction work on Little Island that had been submitted to the USACE by Steve Waltjen, DCW's and Mr. Wagner's contractor for construction work on Little Island. On information and belief, this photographic summary was submitted to the USACE in the form of an enclosure to a letter of June 2, 2005, from Mr. Waltjen to Sandra A. Zelen, an Enforcement Program Manager for the USACE. The USACE has not produced this photographic summary.

---

<sup>1</sup> The CBF submitted its FOIA request to the USACE in the form of a signed letter printed on CBF letterhead. Exhibit 2 is an unsigned Word version of this request. CBF cannot at this time locate a signed copy of the CBF FOIA Request. Exhibit 2 is identical to the copy submitted to the USACE except that it is (1) unsigned and (2) not printed on CBF letterhead.

15. The photographic summary was also submitted to the Maryland Department of the Environment (MDE). The CBF obtained a copy of the photographic summary from the MDE, but it was a poor quality copy. On information and belief, the quality of the copy in possession of the USACE is significantly better than the quality of the copy in possession of the MDE.

16. On July 3, 2008, in response to the CBF FOIA Request, the USACE produced 126 pages of records, but withheld 497 pages of records claiming that the records were exempt from disclosure under FOIA Exemptions 5 and 7(a). Among the documents withheld was the photographic summary submitted to the USACE by DCW's and Mr. Wagner's contractor. In withholding these records, the USACE failed to make any showing of the applicability of the exemptions to the withheld documents. Instead, the USACE simply claimed in a conclusory fashion that the documents fell within Exemptions 5 and/or 7(a):

Exemption 5 allows an agency to withhold inter-agency or intra-agency memoranda under the deliberative process privilege. Agencies can invoke the deliberative process privilege provided communications are 'both predecisional and deliberative.' See *Sidney M. Wolfe, et al., v. Department of Health and Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988). I am withholding 14 pages of records under exemption 5.

Exemption 7(A) provides protection for information compiled in law enforcement records, the disclosure of which 'could reasonably be expected to interfere with an enforcement proceeding.' The 'law' referred to in Exemption 7 includes both civil and criminal statutes as well as those statutes authorizing administrative (i.e., regulatory) proceedings. See *Rural Housing Alliance v. U.S. Department of Agriculture*, 498 F.2d 73 (1974). I have determined that 403 pages of the records you have requested meet the criteria of 7(A) and are, therefore, exempt from disclosure.

I have also determined that 80 pages of records fall under both exemptions 5 and 7(A), and am withholding them as well.

Exhibit 1, Letter to CBF from USACE (July 3, 2008).

17. The USACE has the burden of proving that the withheld documents fall within Exemptions 5 and/or 7(a) of the FOIA. 5 U.S.C. § 552(a)(4)(B) (“In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and **the burden is on the agency to sustain its action.**”) (emphasis added). The USACE’s unsupported assertion that the withheld documents fall within one or more exemptions of the FOIA fails to satisfy this burden. *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973) (recognizing that the FOIA statute places the burden to justify withholding records on the government and remanding the matter to the trial court so that “the Government [could] undertake to justify in much less conclusory terms its assertion of exemption”); *Santos v. Drug Enforcement Agency*, 357 F.Supp.2d 33, 37-38 (D.C. 2004) (stating that the “Court cannot engage in a reasoned analysis of the defendants’ arguments for exemption where there is no connection drawn . . . between the documents and the exemptions and none of the claimed exemptions is correlated to a page or document, let alone to particular parts of a document as is required in order to justify withholding information.”) (quotations and citations omitted).

18. On August 7, 2008, the CBF appealed to the USACE its response to the CBF FOIA Request (CBF Administrative Appeal). Exhibit 3, Letter from CBF to USACE (Aug. 7, 2008). In addition to contesting that all of the withheld records were exempt from the FOIA, especially the photographic summary that was produced by a third party, the appeal requested that the USACE produce a *Vaughn* index “describing who the withheld documents were generated by, who it was provided to, the date of the document, a description of the document

(*e.g.*, letter, memo, email), and a brief summary of the contents of the document.” *Id.* The USACE has not responded to the CBF Administrative Appeal other than to verbally acknowledge receipt and indicate that it would not produce a *Vaughn* index.

19. The USACE is required to make a determination regarding the CBF Administrative Appeal within 20-days of receiving it:

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, **shall**—

\* \* \*

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

5 U.S.C. § 552(a)(6)(A) (emphasis added). Although it is required to reach a determination on the CBF Administrative Appeal within 20 days of receiving it, over eight months has passed since the USACE first received the CBF Administrative Appeal and the USACE still has not responded to the CBF Administrative Appeal.<sup>2</sup>

20. On October 6 and 23, 2008, and February 6, 2009, the CBF attempted to contact the USACE *via* telephone regarding the appeal but was only able to leave voice messages. It has been over nine months since CBF submitted its appeal and the USACE has not formally responded.

---

<sup>2</sup> In order to accommodate for “unusual circumstances” that may arise, the FOIA allows agencies to extend the 20-day time limit for ruling on administrative appeals. Such extensions, however, must be done “by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i), *see also* 32 C.F.R. § 518.17(d). The USACE never provided the CBF with written notice of such an extension. Moreover, administrative appeals of an agency’s initial determination cannot be extended “for more than ten working days.” 5 U.S.C. § 552(a)(6)(B)(ii).

21. The CBF has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C) and 32 C.F.R. § 518.17(d) regarding the CBF FOIA Request.

### **CAUSE OF ACTION**

#### **Count I: Violation of the Freedom of Information Act**

22. Plaintiff CBF incorporates by reference the allegations in paragraphs 1 through 21.

23. The USACE's failure to disclose the withheld records responsive to the CBF FOIA Request is a violation of the FOIA, 5 U.S.C. § 552.

24. The USACE has not made or even attempted to make a *prima facie* assertion that the records responsive to the CBF FOIA Request are subject to Exemption 5 and/or 7(a) of the FOIA.

25. CBF is entitled to reasonable fees and costs of litigation, including attorneys' fees and costs, pursuant to 5 U.S.C. § 552(a)(4)(E).

#### **Count II: Violation of the Administrative Procedure Act**

26. Plaintiff CBF incorporates by reference the allegations in paragraphs 1 through 21.

27. The USACE's failure to disclose records responsive to the CBF FOIA Request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. The USACE's failure to disclose records as required by the FOIA violates the APA because it is arbitrary, capricious, and an abuse of discretion, not in accordance with the law and without observance of procedure required by law.



### REQUESTED RELIEF

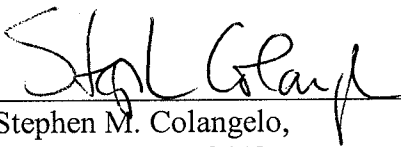
WHEREFORE, the CBF respectfully requests and prays that this Court:

- i. Enter an Order declaring that the USACE has wrongfully withheld the requested agency records;
- ii. Issue a permanent injunction directing the USACE to disclose to the CBF all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until the USACE has fully complied with the FOIA, the APA, and all orders of this Court;
- iv. Award costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E);  
and
- v. Grant such additional and further relief to which the CBF as the Court may deem just and proper.

Dated: June 3, 2009

Respectfully submitted,

By:



Stephen M. Colangelo,  
D.C. Bar No. 378443

Michael W. Maas  
D.C. Bar No. 493685  
Morrison & Foerster LLP  
2000 Pennsylvania Ave., NW  
Washington, D.C. 20006-1888  
Telephone: 202.887.1500

Attorneys for Plaintiff  
Chesapeake Bay Foundation, Inc.